Testimony of

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on
Mediation: An Alternative Approach and
Advance Planning for Less Restrictive Alternatives to Guardianship

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Guardianship Over the Elderly:
Security Provided or Due Process Denied

Mr. Chairman and Members of the Committee, it is a privilege to be able to appear before you to discuss issues of guardianship over older persons and the serious problems that continue to plague the guardianship systems in states across the country. What I[1]ve been

asked to do today is not to talk directly about the problems with guardianship, but rather to talk about two alternative approaches that can help avoid unnecessary and inappropriate guardianship.

o One is an alternative process -- the use of mediation -- to help older persons, their families and caregivers address problems and disputes that often lead to guardianship and to assist them in exploring options and alternative solutions.

o The second, which is often part of the mediation process, is advance planning for the use of alternative mechanisms such as durable powers of attorney and advance directives for health care. Though not without problems, these are less restrictive of individual rights than guardianship and allow the individual to decide in advance who will make certain decisions for them and how those decisions will be made in the event they later lose capacity to handle their own affairs.

PART I. MEDIATION: AN ALTERNATIVE APPROACH

Because mediation is relatively new to many in the aging network, the following example is provided by way of introduction. It is based on an actual case mediated in one of The Center for Social Gerontology's (TCSG) pilot adult guardianship mediation projects. It demonstrates not only the value of mediation in some cases, but also the significant differences in both process and result that can occur through the court and through mediation.

Robert Jones is concerned that his sister, Linda Smith, a single working mother, is not giving their mother, Mary Jones, the care she needs and is wasting her assets. Mary Jones has lived in her daughter, Linda's home for a year.
Take One without Mediation: Robert files a petition requesting that he be appointed guardian of his mother. His mother and sister are extremely angry and upset at this action. The matter escalates into litigation in which harsh accusations are exchanged. The judge appoints a third party non-relative as guardian. The guardian moves Mary into an adult care home. All parties end up angry and hurt.
Take Two with Mediation: The parties meet with a mediator who helps them identify needs and issues. They recognize that Mary enjoys living with her daughter, Linda, but she is lonely while Linda is at work. They acknowledge that Mary is confused about her finances and Robert is willing to help. With the mediator's help, they agree that Mary will continue to live with Linda; Robert will help Mary with her bills, and Mary will attend a Senior Center during the week. They agree to meet in three months to review the situation. The parties end up understanding and respecting each other's concerns. And, an unnecessary guardianship is avoided.

A. What led us to consider the use of mediation?

The Center for Social Gerontology (TCSG), along with others across the country, had spent nearly two decades working to reform and improve the statutory schemes by which guardianship is imposed to better protect older persons from inappropriate and unnecessary guardianship. These efforts focused on such concerns as: inadequate notice to the person alleged to need a guardian (the respondent); inadequate due process

protections; minimal participation of the respondent in court proceedings, lack of legal counsel to represent respondents; and inadequate assessments / evaluations of capacities and incapacities, with the result being frequent imposition of full guardianship and minimal use of less restrictive alternatives.

A fair amount of success was achieved through these efforts in the 1970s and 1980s; many state statutes were revised and many of the concerns addressed. However, in the late 1980s -- most specifically while preparing a response to an ABA questionnaire about issues that should be addressed at the July 1988 National Guardianship Symposium, now known as "Wingspan" -- we began to realize two things that made us ask if, in addition to statutory reform, we should also be looking for other approaches.

First, while these statutory changes promised greater protection for older persons against inappropriate and unnecessary guardianship, they also pushed guardianship hearings to become more formal and more adversarial proceedings. We questioned whether, for many of these cases, the adversarial model is the best approach. It can result in significant economic and emotional costs to the parties and the magnification rather than the resolution of differences among them. It typically results in a "win-lose" situation and may foreclose dialogue among the parties to explore alternative approaches to the difficult issues and problems underlying the guardianship petition and to reach a mutually satisfactory solution. Guardianship cases often involve disputes that go well beyond the legal questions the courts can decide. For example, siblings may battle over who should be guardian or what is the best plan for the parent, when the real issue may be long-standing sibling rivalries and controversies over inheritances. An adversarial proceeding resulting in the granting or denial of a guardianship by the court typically does little to ameliorate these situations and often does little to address the underlying needs and problems of alleged incapacitated persons and their families.

Second, as we and others watched for implementation of the laws, we realized that the practice in many states was not keeping pace with the written law, and many of the protections for older persons that existed on paper, did not exist in reality. For example, findings from a TCSG study of ten states in the early 90s showed that approximately 94% of all guardianship petitions filed were granted, and the vast majority of these were still for full guardianship. We also found that the person at risk of guardianship -- an older person in over 80% of the cases -- typically had little role in the process and often was not present at the hearing.

B. Testing the Mediation Model.

Thus while TCSG continued to work for statutory reforms and their implementation, we recognized their limitations, and looked for an alternative process that might more meaningfully address the complex needs and issues underlying many guardianship cases. We found such an alternative in mediation -- the entry into a dispute of a third-party neutral facilitator without decision-making or reporting powers, in a confidential and less formal setting than a courtroom

In all of TCSG's work in the guardianship field, we believe that, although guardianship

may sometimes be necessary to meet the needs of an incapacitated person, it should be considered only as a last resort when no other less restrictive options are available. Thus our premise in pursuing mediation as an approach is that many cases coming to mediation will find an alternative other than guardianship as a solution to the issues that originally brought the parties to the court.

In 1989, we first sought and obtained funding from the US Administration on Aging and began to test the use of mediation in guardianship cases. Since that time, working closely with the courts, particularly the Hon. John Kirkendall in Washtenaw County, Michigan, the state bar, and the aging network, we have continued to test it in a number of states and have trained over 400 experienced mediators from across the US and Canada to expand their skills to include guardianship cases.

In addition, using an outside evaluator, TCSG recently completed a study of four demonstration projects in Florida, Ohio, Oklahoma, and Wisconsin. The results of the study show that when used in appropriate cases, the parties and attorneys believe that mediation is effective in finding more satisfactory resolutions, such as fewer guardianships, less restrictive alternatives, and resolutions to disputes that better preserve family relationships than contested court decisions. Also, in some guardianship cases, mediation can provide the parties a time-, money-, and relationship-saving alternative to the court process.

C. What is adult guardianship Mediation and What Issues are Involved?

Adult guardianship mediation is a facilitated discussion among the parties that can occur before a petition is filed for guardianship of a person and/or estate, while a petition is pending, or after a guardian has been appointed. The mediator serves as a neutral facilitator, not as judge or decision maker. The mediator does not decide how the matter will be resolved; the parties decide. The mediator's role is to guide the process in a way that leads to better understanding among parties, clarifies issues, draws out ideas for resolution and builds consensus and possible agreement by all parties.

For purposes of our discussion today, the following are a few of the most significant features of the use of mediation.

o the setting is much less formal than court proceedings, and thus less confusing and intimidating to parties;

o it provides an opportunity for all parties -- the alleged incapacitated person, family members and caregivers -- to move beyond the presenting legal issues and assists them in identifying, addressing and resolving underlying family issues and problems that may have prompted the idea of or actual filing of a guardianship petition.

o mediations are confidential, unlike court proceedings in many states. Most states have statutes or court rules that preclude the admissibility of information discovered in a mediation and prevent mediators or their notes from being subpoenaed. The exception is where abuse of a vulnerable person is revealed during a mediation and where state statutes require that this be reported;

o it provides a forum and facilitator to help explore options and test possible solutions as to what can and cannot realistically be achieved by appointing a guardian and what alternatives exist, such as money management and bill-paying services, home care, durable powers of attorney, advance directives for health care, etc.

o it allows the parties to work out a solution that addresses the underlying issues in a dispute and one which is acceptable to everyone involved;

o it avoids the polarization and feelings of betrayal that can result from a contentious "win-lose" court hearing and can foster the preservation of relationships; and

o it allows an older person or person with a disability who is subject to a guardianship proceeding to take an active part in the decision-making process and helps maintain her/his maximum autonomy.

A court's response to a guardianship petition is limited to statutory solution -- to appoint a full guardian, appoint a limited guardian, or dismiss the case. As noted above, in the vast majority of cases, the courts grant the petitions and full guardianship is imposed. The emphasis is on determining capacity and naming a guardian, not on resolving the underlying problems. Mediation, on the other hand, focuses on addressing the needs and interests of the people at the table, and solving the problems they identify. It can provide a vehicle for discussion among the parties as to what can and cannot realistically be achieved by appointing a guardian. Further, as many guardianship petitions are filed in the midst of a crisis situation, the parties may not be aware that other alternatives exist; mediation can help the parties explore various options and alternatives -- for example, money management and bill-paying services, home care, durable powers of attorney, advance directives for health care, etc. -- as well as about their availability and costs. Mediation allows the persons involved to search for creative responses to their real needs and concerns. It can allow the needs of the older person or person with a disability to be met without taking away the person's fundamental rights and autonomy. We expected that most cases going through the mediation process would not result in the imposition of a full guardianship, and this has proved to be the case.

The issues involved in guardianship mediation tend to revolve around safety and autonomy, living arrangements, and financial management. Oftentimes, mediators find that the legal issues presented in the court petition or motion are not the underlying issues causing the family turmoil. The parties in mediation may focus on quite different issues from those that would be argued in a legal case. Sometimes there are no contested legal issues, but there are significant family disputes or concerns that need to be addressed. Families facing difficult decisions about care and intervention may be unable to communicate in a positive manner about difficult choices. Family dynamics may be such that old communication patterns block constructive decision-making. Changing roles of parent and child may cause uncertainty in raising issues. Many of the same issues raised in court cases -- safety and autonomy, living arrangements, financial management -- along with others concerning planning for the future, can be resolved in mediation without court involvement.

When the dispute is over the need for a guardian, the primary issue often presents as one of safety versus autonomy. Does this adult have the right to make her or his own choices and decisions if others feel those decisions are unwise and will impact her or his safety? To what extent is an older adult allowed to make what others may consider to be "bad" decisions? Are family members attempting to control decisions that should not be theirs to make? For the court, the question is whether there is sufficient evidence to show that the person meets the legal definition of incapacity. In mediation, a legal finding of capacity or incapacity is not the issue. Rather, the issue may be whether there are ways that a person can reduce risks to health and safety within a context of dignified autonomy. Other issues in dispute may concern the type or level of care and assistance a person might need and should receive, who will provide services/care to the extent they are needed, where a person will live, how money will be spent or invested and who will be involved in decisions about money, or what medical treatment will be given.

D. Essential Policies and Limits for Mediation in Guardianship Cases

While we saw much promise in mediation as we began to test it, we also recognized it needed to be approached very carefully, and special policies and procedures are needed to address the unique issues that guardianship cases present. While time and space do not allow discussion here, major issues are highlighted and several forms which provide more detail are included in the appendices.

Perhaps most important is to recognize what mediation does and does not do. It does help older persons and their families address underlying issues and disputes described in the previous section. It does not address the legal question of capacity or incapacity -- only the court makes that decision. Equally important is to recognize that not all guardianship cases are appropriate for mediation, and not all cases need or can even use mediation. We believe that cases inappropriate for mediation are those where domestic abuse or substance abuse are involved, where an emergency decision is needed by a court, where the parties exhibit volatile or extremely hostile behavior, or when the possibility of coercion or intimidation of a vulnerable party exists. (See appendix for a sample case acceptance and abuse reporting policy.)

There are significant and challenging issues regarding protection of respondents and respondents[1] rights that must be addressed in guardianship cases. When a petition is filed, an allegation is made that the respondent is legally incapacitated and unable to fully comprehend or make his or her own decisions about personal and/or financial affairs. This raises questions about the capacity of the respondent to participate and about balance of power in guardianship mediation. This requires addressing two related issues. One is providing necessary support and accommodation for meaningful participation by the vulnerable adult/respondent so that he/she truly has a voice in the process. While this is important in any mediation, it is particularly important where one is alleged to be incapacitated. Second is providing the assistance necessary to protect against undue pressure, and manipulation in the mediation and to assure that vulnerable adults understand the meaning and consequences of any agreement they enter into or that they have adequate advocacy to assure such understanding. Essentially, in the absence of a

very clear and knowing waiver, mediation should never be used in a way that will reduce the rights otherwise available to any party, but particularly the vulnerable adult/respondent. (See appendix for a sample policy on protection of respondent rights.)

Another critical issue is that of confidentiality and the sharing of information. It is extremely important to determine what laws/rules exist that apply to mediation in guardianship, and within the parameter of those rules to determine what information can/cannot be shared, by whom, and in what situations. Exceptions to confidentiality also need to be considered, particularly in light of state laws that require reporting of abuse, neglect or exploitation of elders/vulnerable adults and parties need to be notified prior to the mediation of any exceptions to confidentiality. (A sample "agreement to mediate" form which enumerates several exceptions to confidentiality is included as an Appendix.)

E. Family Caregiver Mediation: The Current Initiative

As our experience with guardianship mediation grew, we became increasingly aware of the importance of getting to older persons and their families early, before they are on the court house steps -- before the petition has been filed. In handling post-petition cases, we found that the act of filing a petition can alienate the respondent and/or other family members, and entrench people in their positions. Having received a court paper alleging that he or she is "legally incapacitated" may so anger or upset the respondent that rational discussion is extremely difficult. Once attorneys are a part of the picture, parties may become more confrontational or adversarial. Since the court process emphasizes the legal issues, it can make people less open to discussing underlying issues and needs.

Further in analyzing the kinds of underlying issues and disputes that often lead to a guardianship petition, and that were the issues being mediated, it was clear that many of them are, in fact, family caregiver issues. It seemed that if mediation could be used early on, to assist older persons and family caregivers in addressing problems and disputes that arise as they face the physical, emotional and financial demands of caregiving, later resort to guardianship might be avoided. This coincided with the growing recognition by Congress and all levels of the aging network that more needs to be done to provide support for family caregivers, and that there is a need to test new and innovative support services. Knowing that caregiving is extremely stressful, requires very difficult decisions, and that those decisions often erupt into disputes with the elder and/or other family members, we felt that mediation had great potential for reducing tension and pressure. It could help families address their disagreements and move beyond them to explore mutually agreeable solutions. We therefore proposed and received funding from the Administration on Aging to test mediation as a support service for elders and family caregivers.

Caregiver Mediation is now being tested in three sites: SE Michigan with our Area Agency on Aging 1B, the Atlanta area of Georgia, and the Champlain Valley area of Vermont. (Brochures on the project have been provided.) One of the greatest challenges

is to get mediation recognized as a potentially valuable caregiver support. At this point, it is not on the radar screen for many in the aging network who work with family caregivers and could be referral sources. Our initial efforts have therefore been directed to educating potential referral sources, and generating support and referrals. While we are still in the early stages, the response has been extremely positive. We continue to work with the courts and attorneys because many caregiver cases have already reached the point where guardianship petitions are filed. But based on early learning and input from the aging network and users of the service, we have changed the way we describe the service. Instead of calling it "caregiver mediation," which can sound legalistic and threatening, we now call it "*family caregiver mediation and shared decision making services.*" This puts the focus on person-centered *and* family-centered planning and recognizes the importance of a neutral facilitator helping *all* parties address their needs and concerns. The hope is that this slight shift in focus will make mediation a more valuable and empowering support service for both caregivers and care recipients. An APS worker who was involved in one of the mediated cases stated that, in three hours, mediation accomplished more in bringing the family together and working toward a common goal, than she had been able to accomplish in over a year.

Assuming it succeeds, our long-term goal is to make *family caregiver mediation and shared decision making services* a part of the mainstream caregiver support system. We are delighted at the opportunity to share early news of the project with the Committee. Our hope is that Congress and the administration will recognize the importance of early mediation in caregiver situations and support it, not only as part of the national caregiver support initiative but also in an effort to avoid unnecessary guardianship petitions.

PART II. ADVANCE PLANNING FOR LESS RESTRICTIVE ALTERNATIVES TO GUARDIANSHIP

Beyond considering mediation as an alternative to the court process in guardianship cases, it is extremely important to educate and encourage not only older persons, but adults of any age to plan in advance for the possibility that someone else may need to take over the management of their personal and /or financial affairs. The limited statistics we have indicate that few people do such contingency planning. Yet without it, if one does become incapable of handling their own affairs and making their own decisions, the most restrictive form of surrogate intervention -- guardianship -- is all to likely to be imposed.

The advance planning mechanisms discussed below are divided into two broad categories: (1) Health Care Decision Making Alternatives and (2) Property/Financial Management Alternatives. The various mechanisms falling under each of these categories will be briefly described with a short discussion of the advantages and disadvantages.

A. Health Care Decision-Making Alternatives

A very common trigger for a guardianship petition over an older person is the need for a medical decision maker when a health care provider is concerned that the individual is

not capable of making his or her own decisions. In such cases, advance directives offer important alternatives to guardianship. These are formal documents that provide a way for individuals to retain control of health care decision-making in the event of future incapacity or inability to give informed consent. Also, because some states limit a guardian's ability to make certain medical treatment decisions -- especially decisions to refuse life-prolonging treatment -- advance directives may be important even when an individual is already under guardianship.

While the likelihood of accidents or diseases that interfere with decision-making abilities may be greater among our nation's elders, they can occur at any age. And without advance planning, the results can be tragic. A vivid reminder of the tremendous toll this can take on a family, was provided recently with the release of a book, *Long Goodbye: The Deaths of Nancy Cruzan.* It was authored by William Colby, attorney for Nancy Cruzan whose medical treatment case reached the United States Supreme Court. Nancy Cruzan was 25 years old when in January 1983, she suffered severe and permanent brain damage from an automobile accident, and moved into what is commonly referred to as a persistent vegetative state. For eight years, she lay in a Missouri hospital kept alive by a surgically-implanted feeding tube. In 1987, her parents requested that the tube be removed, but the Missouri Supreme Court refused, stating that "*no person can assume that choice for an incompetent in the absence of the formalities required under Missouri's living will statute or the clear and convincing inherently reliable evidence absent here*. The Cruzans appealed to the US Supreme Court asserting the Missouri was violating Nancy's constitutional rights. On June 25, 1990, the high court found that nothing in the US Constitution prohibits a state from requiring "clear and convincing" evidence before allowing a surrogate to discontinue treatment. Nancy Cruzan had talked about her desires if she could not "*live at least halfway normally*," but she had not written a living will which would have provided the "clear and convincing evidence" demanded.

While the Supreme Court decision did not lessen the Cruzan family's tragedy, it did do a number of other things. It recognized that a *competent* individual has the right to refuse treatment, balanced against the state's interest in preserving the lives of its citizens, basing this right on the liberty interest created by the 14th Amendment. One of the most important messages in Cruzan was the Court's clear recognition of the value of advance directives to ensure that one's wishes regarding treatment are clearly known. And this important message was highlighted for the nation through the publicity generated by this crucial court decision.

1. The Federal Patient Self Determination Act

As you all know, the Cruzan case also led Congress to become concerned about individuals' rights pertaining to medical treatment. In 1990, you passed the Patient Self Determination Act (PSDA) to enhance awareness of the right to make advance directives. The PSDA was the first significant piece of federal legislation that addresses medical decision-making. It does not dictate individual state law regarding advance directives in any way. It does however, require hospitals, nursing homes, home health agencies, HMOs, and hospices that receive Medicaid or Medicare funds to inform all patients, in

writing at the time of admission or beginning of services of their right: (1) to refuse or accept medical or surgical treatment, even if refusal would result in death; (2) to make an advance directive; and (3) not to make an advance directive for health care. In addition, it requires health care providers to document whether the individual has executed an advance directive, but forbids them from conditioning admission or receipt of services on the execution of an advance directive. The PSDA and its requirements received substantial attention at the time the Cruzan case was in the news. It has received much less in recent years, and efforts are needed to highlight, once again, this important legislation.

2. Forms of Advance Directives for Health Care

Advance directives take two basic forms: (1) a living will , and (2) a durable power of attorney for health care, also known as a health care proxy. Neither goes into effect until the person loses the ability to make medical treatment decisions. Executing an advance directive provides an opportunity to make well-considered judgments about end-of-life care and other difficult medical situations. Every state has legislation that authorizes the use of some sort of advance directive, and many have laws authorizing both types. A third source of health care decision-making comes in the form of health care or family consent laws. Because these do not involve advance planning and, in this author[1]s view, have significant disadvantages, they are not addressed here.

Below is an overview of the two types of advance directive. Because state statutes vary in restrictiveness and technical requirements, state-specific laws should always be examined.

Living Will: A living will allows an individual (the principal), while competent, to express in writing his or her wish to have life-sustaining treatment withdrawn or withheld if he or she is in a terminal condition and no longer able to make health care decisions. While some laws are written from the perspective that the principal has the right to direct that medical treatment be withheld/withdrawn, others allow the principal to specify that treatments be provided as well as withdrawn. For a living will to become effective, the principal, in many states, must be in a "terminal condition," and the laws vary considerably in how they define "terminal condition". A typical definition defines it as a condition that "within reasonable medical judgment, would produce death and for which the application of life-sustaining procedures would serve only to postpone the moment of death." Other definitions can be extremely restrictive, maintaining that a terminal condition exists only if death will occur "even with the administration of life-sustaining treatment." Some states, with more liberal laws, may include both terminal condition and persistent vegetative state as qualifying conditions for a living will to become effective. Living will laws also vary in how they define "life-sustaining procedure." Medications and procedures which provide for the alleviation of the patient's pain usually cannot be withdrawn. In addition, some laws explicitly include the right to withdraw or withhold artificial nutrition and hydration, while others do not directly address this issue, and a few statutes prohibit it. Generally, living wills require health care providers to follow the instructions in a living will or to transfer the patient to a provider who will. They also

protect health care providers from being sued or criminally prosecuted for following the instructions in a living will. Although living wills are legally binding only in states that have legislation authorizing them, they are often helpful in decision-making for families or health care personnel in states without such laws.

Durable Power of Attorney for Health Care (DPA-HC): The DPA-HC (also known as "health care proxy" or "appointment of a health care agent," or in Michigan, a "patient advocate") is a durable power of attorney which gives the appointed agent or advocate the power to make health care decisions on behalf of the principal. While it is a variation of the ordinary durable power of attorney ("DPA") discussed below, most states have a separate DPA-HC statute, while a few incorporate it into their general power of attorney statute. A recent legislative trend is to incorporate both the DPA-HC and the living will into a combined advance directive law. The DPA-HC goes beyond what can be accomplished through a living will. It provides the principal with the means of maximizing the right to control medical decision-making by designating another person to act as agent to make his or her health care decisions if he or she becomes unable to do so. The scope of the agent's power can be very broad or limited and specific. This power takes effect whenever the principal loses the ability to make his or her own decisions, thus allowing the agent to direct a range of medical decisions, including, but not limited to, those involving life-sustaining treatment. While some states have no restrictions on who may serve as agent, others do impose limits.

Because the DPA-HC goes into effect upon the principal's incapacity, many states' laws include provisions that mandate a specific method for making the determination of incapacity, *e.g.,* two physicians must testify in writing that the individual is unable to give informed consent. In other states, however, it is important to carefully draft the "trigger clause." If the clause only states that the DPA-HC will become effective upon incapacity of the principal, without other direction, there is the danger that the principal will be declared incapacitated too early, or that it will be necessary to use the court system for adjudication of the issue. The document, therefore, should include both a clear definition of incapacity, and a designation of the individual(s) who will make the determination of incapacity. Not all DPA-HC statutes explicitly allow withholding or withdrawal of life-sustaining treatment, but this does not mean that such an action, if directed by the principal, would not be within the rights of the agent. Additionally, whether or not the statute expressly permits it, the DPA-HC may contain written instructions regarding the manner in which the principal wishes to be treated, *e.g.,* whether life-sustaining procedures should be administered when the patient is in a terminal condition. Because of its flexibility, a DPA-HC is a significant and valuable tool in controlling one's health care in the event of temporary or permanent incapacity.

Executing an Advance Directive for Health Care & Choosing an Agent

For an advance directive to be most beneficial, thought and time must be invested in drafting it so that it can provide clear and appropriate direction. Because medical treatment decisions are based on an individual's beliefs, preferences, and values, these should be seriously considered before writing an advance directive. Individuals need to

consider the possibility that their interests while competent may or may not be the same interests as when incompetent. It is important to seriously think about this possible conflict in order to draft advance directives that truly reflect deeply held values. In designating an agent under a DPA-HA, the principal should thoroughly discuss these wishes and values with that person. To assure that the principal's health care desires are honored it is best if the principal also discusses those directions with family members, friends, clergy, and physicians who will be part of the decision-making process. Any reluctance on the part of the physician to follow the principal's stated desires should be discussed. If the physician is indeed unwilling to comply with the principal's wishes, for ethical or other reasons, the principal should consider his or her options, including changing physicians. If these people are aware of the individual's wishes they are less likely to challenge the living will or the agent's power to make medical decisions. State laws vary considerably in the technical requirements for executing advance directives, and in the form they are to take. While an attorney is not necessary to draft an advance directive, it may be wise to consult an expert in this area who can ensure that it complies with state¹s technical requirements. In many states the principal must sign and date the advance directive in the presence of two witnesses who must also sign. Some states also require that a living will be notarized and/or recorded. It is important to note that while compliance with legal requirements is crucial, the principal's primary goal should be to create a document that states her wishes and reflects her values. Further, to ensure that the advance directive continues to express the individual's current wishes, it should be reviewed and updated regularly.

The principal should notify family and physician of the existence of the living will and/or DPA-HC and ask to have a copy placed in his or her medical records. In addition, the principal should keep a copy with other important papers, be sure the agent has a copy and consider asking a close friend or relative, and perhaps a lawyer, to keep a copy. Most states provide that implementation of an individual's living will does not constitute suicide under the laws of the state, and therefore does not invalidate life insurance policies.

Enforcement in Other Jurisdictions

Many individuals are concerned about whether an advance directive executed in one state is valid in another state. Because states vary significantly as to what they allow, there is no clear answer. Approximately two-thirds of state statutes include a "portability clause" that specifically provides that advance directives executed in compliance with the law of other states are valid in the principal state. Of these, some states will honor the directives to the full extent allowed by the law of the state in which it was executed, while others honor them only to the extent allowed by the principal state's law. Some states only accept advance directives prepared in compliance with that state's own law, and still others do not address this issue at all. To avoid later complications, individuals who have executed an advance directive in their primary state of residence should review the law of any other state in which they spend considerable time.

Advantages of Advance Directives

Both the durable power of attorney for health care and the living will are valuable tools for retaining control of one's medical care after incapacity. They increase the likelihood that health care decisions will be made privately, not in court, and that the principal's values and wishes will direct the decisions made. Furthermore, the individual remains in control of the decision-making process as long as he or she is competent; his or her decision cannot be overridden. The absence of any legal direction in medical decision-making creates problems when there is a disagreement among family members or between family and doctors. In addition, some doctors, fearing possible litigation, may refuse to proceed with medical treatment unless a decision-maker has been legally designated which may require adjourning to the courtroom for a judicial determination or appointment of a guardian.

Living Will: The primary advantage of a living will is that it provides written evidence of a patient's preferences, thus giving a measure of control that would not exist if no instructions were left. Further, if properly prepared, it legally binds doctors to respect a patient's wishes, or to find a doctor who can, and it protects medical caregivers from civil and criminal liability for following its instructions. Finally, even if the patient has no close friends or relatives to whom she wishes to give a DPA-HC, a living will provides the opportunity to ensure that one[1]s health care wishes will be followed in those situations covered by a living will.

Durable Power of Attorney for Health Care: The DPA-HC can be a particularly powerful and meaningful document, because it allows the principal to maintain the maximum amount of autonomy. Prior to incapacity a patient is unable to foresee all possible medical circumstances that might arise. With the use of a DPA-HC, the principal may hand pick a trusted friend or relative to act as medical decision-maker, and then thoroughly discuss his or her values and treatment wishes with this person. When called upon to make a medical decision, the agent can talk with the doctors about the alternatives, assess the pros and cons, and make the appropriate decision based upon the principal's wishes.

Disadvantages of Advance Directives

One advantage of advance directives is also a disadvantage. While advance directive laws have provided increasingly complex safeguards to prevent abuses from occurring and to ensure that any grant of authority is voluntary, these laws may also deter individuals from executing a directive because they are so complex and legalistic. In addition, as noted earlier, advance directives valid in one state may not be valid in other states. To prevent this from happening, individuals should review the law of any state in which they spend considerable time before drafting an advance directive.

Living Will: The most significant weakness of many living will laws is that they apply in restrictive circumstances, *i.e.*, the principal must be in a terminal condition. Living will statutes do not provide direction in the frequent situations where the principal is unable to make decisions but is not facing the end of life. Overall, they are static documents,

becoming operational only in limited circumstances and cannot be adapted to specific situations. Some recent living will statutes allow the principal to name someone to make life-sustaining treatment decisions if he or she becomes terminally ill or is in a persistent vegetative state. But, again, if this designation is made in a living will, the designated person can only act in limited circumstances. Also, as noted above, some living will laws are also limited in terms of the treatments that may be withdrawn.

Durable Power of Attorney for Health Care: The primary disadvantage of the DPA-HC is that some statutes do not explicitly authorize the withdrawal or withholding of life-sustaining treatment. However, in a properly executed DPA-HC, written instructions to withdraw life-sustaining treatment if the principal is in a terminal condition would likely be given significant weight. As with the regular durable power of attorney, broad powers may be granted to the agent with a DPA-HC, opening the door for abuse by the agent. However, this risk can usually be controlled with the inclusion of detailed instructions about wanted and unwanted treatments. Finally, the existence of a DPA-HC does not always relieve the physician or other health care provider from the threat of legal action by family members. Some nursing homes and health care facilities may then be unwilling to follow the patient's wishes, as presented in a DPA-HC.

B. Property/Financial Management Alternatives

Beyond health care decisions, another very common trigger for a guardianship petition is an older person[1]s diminishing capacity to handle financial affairs. There are a number of alternative arrangements, short of guardianship or conservatorship, that can be established to handle various types of financial matters. These include: money management alternatives such as bill paying services and utility shut-off protection plans, joint property arrangements, durable powers of attorney, trusts, and Representative Payee. Time and space do not permit discussion of all of these; the discussion here will be limited to the one that is perhaps most important -- the durable power of attorney.

The major caution that applies to any of the alternative arrangements is that, unlike guardianship and conservatorship, there is no court involvement or oversight.

Durable Powers of Attorney

A power of attorney is a written document by which one person (the "principal") appoints another as his agent (or "attorney-in-fact") and confers upon that agent the authority to act in his place for the purposes set forth in the writing. Despite the appellation, the agent/attorney-in-fact need not be a lawyer. The agent is a fiduciary of the principal, and as such, is legally required to act with due care and within the bounds established by the power of attorney. This requirement allows the principal to sue the agent if he breaches his duty. Except in the medical power of attorney context, discussed above, the power of attorney generally gives the agent the power to exert control only over the principal's property, not his person.

For a power of attorney to be valid, the principal must be mentally competent at the time the power is executed; i.e., the principal must have the capacity to contract. Thus,

powers of attorney, while potent planning devices, can do nothing to organize the affairs of one who is already incompetent. They must be executed in advance of incompetence. Powers of attorney remove none of the principal's power. As long as the principal is competent, his actions always supersede those of the agent and he may contract or buy and sell things, despite any actions of the agent. Similarly, the competent principal is always free to revoke the power of attorney. It is always a matter of good practice, however, to notify anyone who is likely to rely on the power of attorney, such as a bank, pension funds, etc., of the revocation of the power.

Forms of Powers of Attorney

Powers of attorney allow for a good deal of flexibility in determining the boundaries and the duration of the agent's power. Subject to state law, powers of attorney can be limited or general, ongoing or of a fixed duration, springing or already operating. The definitions and descriptions of the various forms of powers of attorney are delineated below.

The **non-durable power of attorney** is based completely on rules of agency. Under the common law rules of agency, the power of the agent ends upon the incompetence or death of the principal. Accordingly, this power of attorney is non-durable, and is automatically terminated upon the subsequent incapacity of the principal. This power is useful in authorizing the handling of short-term financial and business matters when the principal is not available. However, this power is not a useful planning tool for an individual concerned about future incapacity. Because it is limited in this way, the non-durable power of attorney has now been supplemented with the durable power of attorney in every jurisdiction.

As its name suggests, a **durable power of attorney** ("DPA") generally continues to operate after incompetence, or becomes effective upon incompetence (the "springing" power discussed below). Every jurisdiction has a statutory provision that allows for the creation of this device. In the majority of states, a DPA is created by the use of language in the writing which clearly and explicitly manifests the principal's intention to have the power continue after the onset of incapacity or mental disability. It is this power of attorney which provides a viable alternative to guardianship; therefore, the remainder of this discussion will focus on the DPA.

A DPA may be adapted to suit the person[1]s particular needs through the use of general and limited DPAs. A **general DPA** grants the agent very broad powers, allowing the agent to conduct all business which the principal could do herself or himself. Typically, this might include handling bank accounts, paying bills, handling real estate transactions, filing taxes, prosecuting or settling claims, running a business, or handling stock transactions. Some statutes, however, limit the agent's power to perform certain activities. A **limited or special DPA** grants the agent only those powers specifically enumerated in the document. Examples include managing a rental apartment while the principal is out of town, handling the principal's banking matters, and selling a house for the principal.

Differences Among Statutes

The DPA statutes in the 50 states and D.C. are not uniform. Although the majority of DPA statutes are based on the Uniform Probate Code (UPC) (1975) or The Uniform Durable Power of Attorney Act (1979), there are several states with nonconforming statutes. Therefore, while all jurisdictions provide for the creation of DPAs, there is much variance among the laws regarding execution requirements, "springing powers," statutory short forms, and limits on the authority granted to the agent**.** Prior to any consideration of implementing a DPA it is important that a person check his/her own state statute and relevant case law.

Establishing a Durable Power of Attorney

In general, DPAs must be executed with substantial formalities. While DPAs, like wills, can be written by a non-lawyer, it is advisable to have them drafted by a lawyer. This will help to ensure that the power addresses the principal's particular needs. and meets state requirements. Generally, the documents must be signed and notarized. Sometimes, they must be witnessed. In drafting a DPA it is important not only to check the law of the state of the principal's residence, but also the laws of any jurisdiction where the power is likely to be used. In this way the drafter can be sure that the power of attorney conforms to the requirements of any jurisdiction in which it may need to be effective.

Finally, it is important to use DPA forms provided by banks and other financial institutions, if there is any probability that the agent will be dealing with them. Failure to do so may result in the bank's refusal to honor the power, defeating the principal's original purpose in granting the power.

Choosing the Agent

The principal may choose the agent. There are generally no qualifications to be an agent; some state laws, however, limit the principal's choice to specific categories of individuals, such as family members. Because there is no court supervision of the agent in many states, it is imperative that the principal make a thoughtful and careful choice. It is a good idea to designate a successor agent, in case the primary one is unable to act. Any compensation that the agent will receive should be determined in advance by the principal and the agent.

Effective Date of Power

Without the inclusion of any provisions to the contrary, it is presumed that the agent's power begins at the time the power of attorney is signed. However, the document may provide for commencement of the power at some future date or event. This is known as a **springing power of attorney**. To our knowledge, although no statute expressly prohibits a springing power of attorney, some are silent regarding this power.

This device can be useful in planning for the possibility of incompetence. An individual who does not wish to give up control over his affairs unless he becomes incompetent can create a springing power of attorney, to become effective only upon the occurrence of incapacity. If this type of DPA is used, the document should specify the meaning of incapacity and who will make the determination that the principal is indeed incapacitated. This "trigger" clause should be drafted with great care. If the clause merely states that the power of attorney shall become effective upon the incapacity of the principal, there is serious danger that control will be removed from the principal too soon or too late, or that it will be necessary to turn to the courts for an adjudication of incompetence, which is what the power of attorney is meant to avoid. The principal should carefully consider what criteria he or she wishes to have used in order to bring the power into operation. As an example, the power might be triggered when a physician and two other persons designated by the principal agree that the principal is incapacitated. It is probably not a good idea to leave the determination of incompetence up to the individual who will be acting as agent. Whatever the criteria, it is important to carefully consider and draft the trigger provision.

Revocation/Termination

As mentioned above, the competent principal is always free to revoke the DPA. However, the methods of revocation vary among the states and are often unclear. The most common way to revoke a DPA is to destroy the document and then notify parties, who are likely to have dealings with the agent, of the revocation. If original or duplicate copies of the DPA are in the possession of the agent it is advisable to send a certified letter (return receipt requested) to the agent, notifying him or her of the revocation of the DPA. This letter is called a "notice of revocation." It should be signed by the principal and notarized. It is also a good idea to have witnesses. If the original DPA was recorded, the notice of revocation should be recorded as well. Even if the original power was not recorded, it is a good idea to record the notice of revocation; recording is the best way to notify all parties involved of the revocation. Copies of this revocation letter should also be sent to anyone who might be expected to rely on the DPA.

DPAs may also be terminated in at least three other ways. First, the principal's death or the agent's knowledge of the principal's death automatically destroys the power of the agent. Secondly, in some states a DPA is destroyed upon the appointment of a guardian for the principal. Finally, the document itself may specify the time at which the power shall terminate. This can either be upon the occurrence of an event, *e.g.* "this power shall remain in effect until I return to my residence from my trip to Pakistan" or upon a date certain, *e.g.* December 25, 2003.

Advantages of the Durable Power of Attorney

The DPA is probably the simplest and least expensive way to plan in advance to avoid the possible future necessity of a guardian. It affords the individual flexibility and control over the decisions that will be made for him/her. She/he can personally choose the decision maker rather than have that person appointed by the court. She/he can limit

or broaden the scope of the decision maker's powers to suit his needs, and choose the time and the method of deciding when the substitute decision maker should take over. The durable (and non-durable) power of attorney also gives the individual the power to override any decisions made by the substitute decision maker while the principal remains competent, thereby insuring the principal retains maximum control over his affairs. In addition, the competent principal can revoke the grant of power at any time. Through the use of a DPA one is likely to avoid costly, time consuming and embarrassing litigation over guardianship.

The DPA offers advantages not found in the joint tenancy alternatives. Because the agent is a fiduciary, there is a greater obligation of due care required of him, and he is less able to use the principal's resources for his own purposes. Secondly, the DPA can allow simple money management, without establishing any after death distribution presumptions (as might arise with a joint bank account). Finally, DPAs allow the substitute decision maker to handle a greater range of property matters if the principal so wishes. They can be used to buy and sell property (in most jurisdictions), to file and pay taxes, to enter into other contracts, to fund *inter vivos* trusts, and to bring or defend a suit.

Disadvantages of the Durable Power of Attorney

An important limitation of the DPA is that it can only be created before the individual becomes incompetent. A DPA is void if, at the time of signing, the individual does not have the capacity to contract. This may mean that the attorney-at-law drafting a DPA must be very cautious to document his client's (i.e. the principal's) competency at the time of execution. If an attorney-at-law has a client who has periods of lucidity followed by periods of confusion (for example a client with Alzheimer's disease) it is important to have witnesses who can testify to the client's competency at the time the DPA was executed. It would be useful, in some circumstances, if at least one witness to the execution was the principal's physician; however, this is not advisable for durable powers of attorney for health care. Similarly, an audiotape or videotape of the document's signing might be good evidence of the client's competency.

Another problem of which to be wary is that many banks and other third parties will not recognize the power unless it is set out on their own forms. This can cause problems if the principal executes a DPA, becomes incompetent and the agent then tries to transact business with the bank as the agent for the principal. It is very important to be sure you have used the bank's form if the DPA is to include the power to transact banking business. In addition, there may be others, i.e. prospective purchasers of property, who will balk at the idea of transacting business with the agent.

The utility of a DPA may be limited in other ways. For instance, the agent may not possess the power to perform certain acts that later become necessary. Without careful planning, guardianship may be the only possible course of action. Further, if a guardian is appointed, many statutes provide that the DPA terminates automatically, and the guardian retains all decision-making power.

One of the advantages of a DPA is also one of its disadvantages, depending on the perspective taken. Because the principal always retains the power to supersede the agent's actions, the power may be an ineffective safeguard for the individual who, while legally competent, may go through very belligerent phases, such as sometimes happens with an Alzheimer's patient. This principal can override the actions of the agent unless the agent goes to court to have the principal adjudicated incompetent. A different result is possible with the use of a springing power of attorney which clearly states those conditions upon which the principal is deemed incompetent and his authority is overridden.

However, the use of a springing power of attorney also may have disadvantages. For instance, if a springing power is based on incapacity, the process for determining the principal's incapacity may be as burdensome as a guardianship proceeding, and may entail expenditures of time and money that the principal originally sought to avoid. In addition, if capacity must be determined for the power to take effect, this could delay action that needs to be taken immediately.

Finally and most important, it is essential to note that the DPA is open to possible abuse by the agent, and numerous cases of such abuse have been reported. Although the agent owes the principal a fiduciary duty, that duty will not be put in issue unless raised by the principal or a third party. There is very little formal regulation or monitoring of DPAs. If the principal is incompetent and in the care of the agent, there is always the danger that the agent may abuse the powers granted to him. In practice very few elderly principals are prepared to take the agent (frequently a child or other close relative) to court. One way to guard against the power being abused is to thoroughly explain to the agent all the duties, responsibilities and legal liabilities connected with the power. To impress the responsibilities upon the agent, it might even be good to draw up a second document which enumerates those duties and ask the agent to acknowledge those duties, by signing this document. Also, because the DPA is so flexible, it is possible to write provisions into the document requiring accountings, bonding and insurance.

Conclusion

Although, as noted at the start of this section, there are other important alternatives that exist for property/financial management, time and space do not allow for discussion here.